GANDA EDIBLE OILS BHD.

v.

AIK HENG HUNG SDN. BHD.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL APPEAL NO. 3 OF 1983]
11 OCTOBER 1983

CONTRACT: *Consignment contract - Non-delivery due to accident - Whether hauliers liable - Exemption from liability - Verbal agreement - Not expressly pleaded - Effect - payment by insurers - Subrogation - Whether consignors barred from claim.*

EVIDENCE: *Claim of verbal agreement - Failure to cross-examine - Effect - Subrogation - Whether evidence could be adduced.*

The appellants consigned bleached refined palm oil to the respondents, who were commercial lorry operators, for delivery to an address in Singapore. The oil was totally lost when the hauliers' lorry carrying the oil overturned in an accident. The consignors who were paid for the loss by their insurers signed a letter of subrogation in their favour. The hauliers claimed exemption from liability by virtue of verbal agreement with the consignors. But neither the verbal contract nor the claim of exemption from liability was pleaded in the hauliers' defence.

Held:

[1] The hauliers would not be liable in common law negligence as bailees if the finding by the trial Judge regarding the claim of a verbal agreement can be supported having regard to the evidence and pleadings. In the case of bailment, the non-delivery of the goods in question is *prima facie* evidence of negligence and shifts the onus to the bailee to prove either that the loss is without his fault, or if it is due to his fault, that his liability is excluded by some exemption agreement, if any. Such an agreement need not be in writing, and can be express or implied. (*Syarikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority* [1971] 2 MLJ 27; *Thomas & Co. v. Brown* [1899] 4 Comm. Cases 186; *Coupar Transport (London) Ltd. v. Smith's (Acton) Ltd.* [1959] 1 Lloyd's Law Reports).

[2] In all the circumstances of the case, it would be unjust not to consider or to preclude the issue of the verbal agreement. A failure to cross-examine an opponent's witness amounts to an acceptance of the evidence of such witness, subject to some exceptions. Further, it was reasonably clear from the defence what was meant by the verbal agreement, that it was for the consignors to look to their own insurers for any loss.

[3] There was no substance in the submission by the hauliers that the consignors should not have been allowed to adduce evidence about the action being filed at the instance of the consignor's insurers by way of subrogation because it was not pleaded by the consignors in their statement of claim. The receipt from insurers of payment or indemnity would not be a bar to a claim of loss. Subrogation simply means that, on payment of loss under a policy of indemnity, insurers are entitled to be placed in the position of the insured, and further, that they are entitled to succeed to, or take over, all rights and remedies against the third persons from the insured. (*Mason v. Sainsbury* [1782] 3 Doug. 61).

[Appeal dismissed.]

Cases referred to:
Syarikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority [1971] 2 MLJ 27
Thomas & Co. v. Brown [1899] 4 Comm Cases 186
Coupar Transport (London) Ltd. v. Smith's (Acton) Ltd. [1959] 1 Lloyd's Rep
Mason v. Sainsbury [1782] 3 Doug 61

Legislation referred to:
Contracts Act 1950, s. 104

Other sources referred to:
Phipson on Evidence, 11th Edn., para. 1514

For the appellants - A.S. Sidhu; M/s. Shook Lin & Bok
For the respondents - Anthony Fernandez; M/s. Fernandez & Partners

JUDGMENT

Peh Swee Chin J:

In this appeal, the appellants/plaintiffs (hereinafter called the consignors) consigned 13.27 metric tons of bleached refined palm oil valued at RM18,047.20 to commercial lorry operators, viz. the respondents/defendants (hereinafter called the hauliers) for delivery to an address in Singapore. The oil was totally lost when the hauliers' lorry carrying the same overturned in an accident. The consignment of the oil to the hauliers and its non-delivery to its destination in Singapore were admitted by the hauliers.

The consignors' statement of claim asked for the said sum of RM18,047.20 with interest on grounds of breach of duty under s. 104 of the Contracts Act, 1950 and for common law negligence as particularised therein. The defence filed by the hauliers, while admitting the consignment and non-delivery described above, denied the claim of the consignors and the rest of the statement of claim, and in particular para. 3 of their defence provided:

> The defendants deny para. 4 of the statement of claim and put the plaintiffs to strict proof hereof. The defendants aver that it was an implied and/or express terms of the contract, that the plaintiffs would insure their goods against any loss or damage caused to the plaintiffs' goods while they were in the defendants' possession and did in fact do so.

The action proceeded, and the claim of the consignors was dismissed with costs and from this, the consignors have now appealed.

The consignors called in the Court below, only one witness, (PW1), who merely deposed to the handing over of the oil and the particulars of the oil; the mere fact of accident involving the lorry-tanker in question of the hauliers; the payment of the loss by their insurers in regard thereto in the sum as claimed in the action and about having signed a letter of subrogation (P4) in favour of their insurers. The evidence thus revealed, by understandable implication, that the action had been filed for insurers' benefit for recovery of the sum already paid to consignors. Certain questions concerning the agreement to transport the goods were put to PW1 who said he was not involved in this matter and that the hauliers might have discussed it with his manager.

The hauliers called two witness *viz.* DW1 and DW2. DW1, (the Managing Director of the hauliers as well as an uncle of DW2), deposed to the effect that he and DW2 had seen one Mr. Lee, the manager of the consignors/company, negotiating and agreeing with the latter that the consignors would be responsible for any damage to the oil due to any motor accident while the hauliers would be responsible for such damage due to mechanical faults of the hauliers' vehicle or misconduct of the hauliers' drivers. It was agreed that the consignors

would, therefore, insure the oil. When the summons in the action was issued, DW1 saw the said Mr. Lee who said it was not the consignors' intention to file the action. What I have set out above is the gist of DW1's evidence-in-chief.

DW1 was only cross-examined on the fact that there was non-delivery of the oil in Singapore due to the said accident and he gave DW2's name on being asked for it. DW2 gave similar evidence and he was not cross-examined at all.

Learned Counsel for the hauliers, *inter alia,* both here and in the Court below, submitted that the evidence of DW1 and DW2 of the verbal agreement of the non-liability of the hauliers for damage due to accident had not been challenged at all. It was submitted further before me that such evidence was in support of para. 3 of the hauliers' defence quoted above and the learned President was bound to and did make a finding of fact that there was such a verbal agreement. The consignors, in failing or omitting to cross-examine on this verbal agreement, must be taken to have accepted the account of DW1 and DW2, this being a rule of essential justice. The consignors could not now complain about the credibility of the witnesses by virtue of their being related to each other and that from para. 3 of the defence, the consignors would have known that the issue of this verbal agreement would be tried.

Learned Counsel for the consignors submitted in regard thereto that the verbal agreement described by DW1 and DW2 had not been pleaded; that the exclusion of liability was not pleaded in the hauliers' defence; it must be expressly pleaded and could not be implied; that the DW1's and DW2's evidence did not suggest an exclusion of liability.

The learned President accepted the evidence of DW1 and DW2, in effect, and made an express finding of fact that the liability for loss due to accident was thus excluded by such verbal agreement. He also referred to this issue not being challenged at all in cross-examination by the consignors.

It now becomes necessary for me to examine as to whether the particular finding of the learned president, in view of the opposing contentions set out above, was manifestly or plainly wrong or such that this Court should reverse it. This is, from its nature, a finding of fact. Would this finding of fact, whether supportable or not having regard to the evidence and the pleadings, be a sufficient justification for dismissing the claim of the consignors?

No evidence was adduced on the allegation of common law negligence by the consignors; quite rightly so, for in a case of bailment, (this case being a classical one), the non-delivery of the goods in question is *prima facie* evidence of negligence and it shifts the onus to a bailee to prove one of two things; first that the loss complained of is without his fault, or if the loss is due to his fault, that his liability is excluded by some exemption agreement, if any. Please see the case of *Syarikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority* [1971] 2 MLJ 27. Again, a contract of bailment, despite s. 104 of the Contracts Act, is a mere contract and parties to such a contract, if they choose, can contract themselves out of any particular liability. Such a contract need not be in writing, and can be express or implied. Thus, both Counsel relied on the case of *Thomas & Co. v. Brown* [1899] 4 Comm Cases 186 which, itself, is illustrative of such an implied contract. In that case, the defendant, a lighterman, agreed to lighter plaintiffs' goods to steamer. There was no express contract as to the terms of the contract but both parties knew that plaintiffs would insure their goods. It was a common practice for lightermen on the Thames to contract that they would not be liable for any insurable risks. It was held that the contract was subject to such an implied condition. Counsel for the consignors tried to distinguish this reported case on the ground that the plaintiffs there paid a low freight and that the policy was issued subject to the

condition that there was no recourse to the lighterman. We have however no evidence, in the instant case, as to any amount of freight that was paid and further it is possible that if the verbal agreement between DW1 and Mr. Lee aforesaid was true, that the consignors had possibly forgotten to inform their insurers about the limited exemption of liability as regards accident. Learned Counsel for the hauliers referred to another case of *Coupar Transport (London) Ltd. v. Smith's (Acton) Ltd.* [1959] 1 Lloyd's Rep, another case of the oral agreement to contract out of liability for negligence of the carriers by road between the carriers and persons on behalf of owners of goods carried. Both agreed that there was to be no liability for damage for negligence in the carriage of such goods, and as in the instant case, the insurance was suggested and effected therefore by the owners of goods. It was held that the carriers were not liable for the damage caused due to negligence. If the finding that there was such agreement in the instant case can be supported having regard to the evidence and pleadings, then, in my judgment, the hauliers would not be liable.

This finding of fact must have been one to which the learned President must have been driven, in the total absence of any contrary evidence, in view of the total omission to challenge it in cross-examination; an omission which I believe was deliberate and an honest one, deliberate because if there was such initial forgetfulness on the part of the cross-examiner, when DW1 was giving evidence, such forgetfulness could not have persisted when DW2 again stepped into the box to give similar evidence; honest because the verbal agreement must have been a true one for example, the hauliers' customers, viz. the consignors did take out insurance on the oil. I certainly subscribe to the view that in the circumstances of this case, a failure to cross-examine an opponent's witness or witnesses such as DW1 and DW2 herein would amount to an acceptance of the evidence of such witness or witnesses, subject to some exceptions with which we are not concerned, one of which being e.g. when a Counsel has indicated to Court that he will refrain from asking such questions to save time where several witnesses are called to the same point etc. Please see *Phipson on Evidence*, 11th Edn. para 1514 for such exceptions. Further para. 3 of the defence, though not a model of precision or perfection, in my view, should have been reasonably clear that the hauliers had meant by it, that it was for the consigners to look to their own insurers for any loss. When this issue was raised in evidence by DW1 and DW2 who incidentally spoke almost of nothing else but this, no objection was taken to it as outside the pleadings, neither was there a request from Counsel for any adjournment because of para. 3 of defence for time for further instructions from his clients. In all the circumstances, it would be unjust for either the Sessions Court or this Court not to consider or preclude this issue. Consequently the finding of the learned President on this issue was anything but wrong, and ought to be upheld. With this, it would be sufficient to dispose of the appeal.

However, there is one other matter, i.e. the matter of subrogation on which, at great length, both Counsel had addressed the Court and the learned President had dwelt. I think there was a great deal of confusion into which all the parties appear to have been drawn. Learned Counsel for the hauliers submitted, if I may summarise his argument, that the consignors should not have been allowed to adduce evidence about the action being filed at the instance of consignors' insurers by way of subrogation; the insurers having paid or indemnified the consignors for the loss of oil in question, because it was not pleaded by the consignors in their statement of claim. Since the insurers were the actual claimants or substantive plaintiffs in the instant case, the hauliers were prevented from setting up the defence that the plaintiffs had suffered no loss because the insurers, (who sued in the name of the consignors), had suffered the actual loss. Learned Counsel for the consignors submitted to the contrary. The submission of Counsel for hauliers found favour with the learned President.

In my view, this submission was based on the assumption that if this instant action was filed by the consignors for entirely their own benefit and not for insurers', and if the hauliers came to know of the fact of payment in question by the insurers to the consignors then it would be a good defence or complete answer to the consignors' claim to say that the consignors suffered no loss. In my view, the assumption would be clearly wrong. It has been the law for at least 200 years that the receipt from insurers of payment or indemnity would not be a bar to such a claim. (See *Mason v. Sainsbury* [1782] 3 Doug 61). Subrogation simply means that on payment of loss under a policy of indemnity, insurers are entitled to be placed in the position of the insured, and that means further, that they are entitled to succeed to, or take over, all rights and remedies against the third persons from the insured. The submission of Counsel for the hauliers was therefore without substance.

In view of my earlier conclusions on the finding of fact regarding the said verbal agreement, I would dismiss the appeal with costs.

Also found at [1983] 2 CLJ 261